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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1936

No. [redacted] 7

SILAS MASON COMPANY, INC., WALSH CONSTRUCTION COMPANY, GUY F. ATKINSON, GEORGE H. ATKINSON, WILLIAM E. KIER and ELMER L. KIER, copartners as ATKINSON-KIER COMPANY, and MASON-WALSH-ATKINSON COMPANY,

Appellants,

vs.

TAX COMMISSION OF THE STATE OF WASHINGTON; HAROLD H. HENNEFORD, THOMAS S. HEDGES and T. M. JENNER, constituting the Tax Commission of the State of Washington,

Appellees.

APPELLEES' BRIEF

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

APPELLEES' BRIEF

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1936

No. 773

SILAS MASON COMPANY, INC., WALSH CONSTRUCTION COMPANY, GUY F. ATKINSON, GEORGE H. ATKINSON, WILLIAM E. KIER and ELMER L. KIER, copartners as ATKINSON-KIER COMPANY, and MASON-WALSH-ATKINSON COMPANY,

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STATEMENT OF THE CASE

This is an appeal from a judgment of the supreme court of the State of Washington reported in 88 Wash. Dec. 60, 61 Pac. (2d) 1269, (R. 56)

sustaining the Washington State Occupation or Business Tax (Chapter 191, Laws of 1933, page 869 *et seq.* as amended by Chapter 57, Laws of 1933, Ex. Sess., page 157 *et seq.*) as imposed upon the business conducted for gain by independent contractors in the construction of Coulee Dam and power plant under contract let by the Federal government through the Bureau of Reclamation.

Inasmuch as appellants seek to construe the tax as one upon the contract rather than as a tax on private business conducted by the contractors or as a tax upon sales to the United States government, it will be necessary to briefly review the character of the Coulee Dam project.

The Coulee Dam Project Was Initiated by the State of Washington

The Columbia Basin Commission was created as an agency of the State of Washington by chapter 81, Laws of Washington for 1933. On behalf of the state, and using state moneys, it let contracts for the first steps in the work, that is for core drilling and for test pit and trench work.

The State of Washington also defrayed the expenses of the Bureau of Reclamation in doing the necessary engineering work and in the preparation of the very plans under which appellants in this case are working.

By stipulation, all of the original exhibits (too voluminous to be printed) have been made a part

of the record in this case for consideration on this appeal: The reports of the Columbia Basin Commission show that the State of Washington bore the expense of the appraisal of private property which it might be necessary to acquire in connection with the project. (Exhibits D, E, R. 89.)

In short, the State of Washington carried on the project until relief moneys were allotted to it under the National Industrial Recovery Act. (48 U. S. Stats. at Large 195.)

This act, approved June 16, 1933, was for the purpose of encouraging national industrial recovery and providing for the construction of useful public works.

By Sec. 202 of Title II of this act the emergency administrator of public works, under the direction of the President was authorized to prepare a program of public works including projects for the conservation and development of natural resources whether said public works were authorized by a state or any political subdivision thereof.

By Sec. 203 thereof (for the purpose of increasing employment quickly) the President was empowered to construct or aid in the construction of any such project, to make grants to states, municipalities and other public bodies and with relief moneys acquire by purchase or condemnation any property necessary.

The first resolutions (July, Sept. and Oct., 1933) allotting such relief moneys to this project provided that the State of Washington should reimburse the Federal government for amounts so expended, and the moneys allotted were to be expended in accordance with the terms of a contract satisfactory to the administrator of public works and the State of Washington. (R. 17 to 20.)

By resolution of March 14, 1934, the project was formally included in the Federal Public Works program, and a sum of money allotted and transferred to the Bureau of Reclamation, Department of Interior, to carry on the work. (R. 20.)

Exhibit 6 attached to the amended complaint is a copy of the contract between the State of Washington acting through the Columbia Basin Commission and the United States acting through the Commissioner of the Bureau of Reclamation whereby the Bureau of Reclamation agreed to do certain work, such as the preparation of plans, to the extent of $377,000 which money was to be furnished by the State of Washington. (R. 21.) This contract was carried out by both parties and as a result thereof the plans on which appellants are now working were prepared.

A contract was tendered to the State of Washington by the Secretary of the Interior following the allocation of N. I. R. A. moneys for the project. It was executed on behalf of the state and returned to

the Secretary of the Interior, but the state has not been advised of the action taken thereon. (R. 27.)

It will be seen that the project was referred to as a power project, and inasmuch as it was supposed to be self-liquidating, paragraph 12 of the contract as prepared by the Department of Interior provided that title to the dam and power plant should remain in the United States until the cost of the project had been fully repaid. (R. 30.)

The agreement then provided that the Columbia Basin Commission was to act in an advisory capacity, and it gave to the State of Washington an option whereby it might purchase the perpetual right to the entire power output of the first unit of the project which was the dam and power plant. (R. 30.)

As found by the trial court, the project was fostered by the efforts of the state and Federal governments to bring relief to the unemployed by virtue of and within the spirit of the National Industrial Recovery Act. Its primary purpose at the time was to relieve unemployment. (R. 53.)

A second purpose was to irrigate and reclaim a vast area of land in both public and private ownership, which land would eventually become the property of the citizens of the State of Washington who would contribute to the cost of the project. (R. 53.)

Another purpose, of course, as expressed in the agreements and resolutions allotting moneys to the

state, was for the production of power, and it was contemplated that the sale of power would defray the cost of the project.

The work actually performed by the state was let to independent contractors, and, when an allocation of relief moneys was made to the Bureau of Reclamation for the purpose of continuing the Coulee Dam project, the Bureau of Reclamation advertised for bids, and the work was let to the lowest and best bidder under the regular public works form of contract approved by the Federal Emergency Administrator of Public Works, September 7, 1933 (P. W. A. Form No. 51.) One of such contracts, identified as No. 12R3789, was let to a general contractor, David H. Ryan, in November, 1933. It involved excavation work necessary to the construction of the dam. Another such contract, identified as No. 12R4227, was let to David H. Ryan for the construction of a railroad extending to the project from the town of Odair, Washington, situated some thirty miles from the project.

Both of these contracts are involved in the case of *Ryan v. State* on appeal to this court in cause No. 774, October Term, 1936.

The same form of contract, but identified as No. 12R4359, was awarded to appellants in this case for the construction of the first unit of the dam in July of 1934. (R. 92.)

All of these contracts require the contractor to

do the work according to the specifications for a unit price submitted in the bids, the total amount of the contract for purposes of computing the bond furnished by the contractor being the sum of the various quantities estimated by the engineers multiplied by the unit price bid.

In all of these contracts the contracting party furnishes a bond to guarantee completion, and as an independent contractor is free to adopt any proper method or means of completing the contract.

That portion of the contract awarded to appellants was for the first unit of the project which was solely for the production of power. The change involves a widening of the base, and that portion of the dam now being constructed by appellants is simply an enormous base to sustain the high dam which it is contemplated will be erected and which will be used for the production of power and for the irrigation of thousands of acres of arid lands. (R. 106.)

The individual appellants for purposes of expeditiously carrying out the contract organized a corporation, the Mason-Walsh-Atkinson-Kier Company which qualified to do business in the State of Washington and is actually executing the contract as an agent of the other appellants.

This corporation at first had its office and principal place of business in the city of Spokane, Washington, which is removed from the site of the proj-

ect. It maintained its offices there until the work had progressed to such an extent that it could move its offices to the site where it now conducts, as the supreme court of the state found, stores, messhouses and other commercial activities for the convenience of great numbers of employees and their families. (R. 56.)

The supreme court found that these collateral activities were conducted under state laws, and that all taxes levied by the state were paid with respect thereto.

The area occupied by appellants in the operation of these collateral activities was acquired for purposes of the project by the Federal government, but is now known as Mason City, Washington, and is governed under state law, that is, by the proper state and county authorities. (R. 107.) Appellants have been required to, and in fact do, submit to the requirements and protection of the state law, including taxation, with the single exception of the tax here objected to.

It will be seen that this project initiated by the state, encouraged and finally adopted by the Federal government, was entirely without act of Congress. The contracts were let to appellants without specific authority of Congress. The lands were purchased without approval of the Attorney General as required in the purchase of lands by the United States government. It was apparent that there was

a grave question therefore as to the authority of the Federal government to engage in such a project either as an irrigation or a power project, and it was for this reason that the moneys were allocated to the State of Washington.

The 74th Congress, by amendment to the Rivers and Harbors Bill, approved August 20, 1935 (Public Act 409), (Statutes of United States for 1935, p. 1039), adopted and ratified all contracts which had theretofore been let in connection with the Coulee Dam and other similar projects. In this act the project was described as for the purpose of aiding navigation and regulating the flow of streams, as well as the reclamation of public lands and the generation of electrical energy which it was contemplated would financially aid the project.

There is no act of Congress establishing a federal reservation, nor is there any order of any administrative official connected with the Federal government establishing any reservation. There is no Federal reservation, in fact. (R. 103-4-5.) Exhibit "C" is a map showing a portion of property acquired and being acquired for the irrigation project, but it does not purport to be a reservation by metes and bounds and it is admittedly governed by the laws of the State of Washington. The dam itself, which is being constructed by appellants as independent contractors, rests upon the bed of the navigable river which is the property of the State of Washington.

A section of school lands, the title of which is in the State of Washington, is occupied by the Federal government and used in part by the contractor in connection with this project. (R. 104, 106.)

There is no statute of the State of Washington consenting to the purchase of any of these lands, or ceding jurisdiction to the Federal government, other than certain general statutes which are relied upon in the companion case of *Ryan v. Tax Commission.* While appellants in this case make an assignment of error based upon their claim that there is a Federal reservation outside of the State of Washington, the point was not argued specifically below, and appellants by the very terms of their contracts were required to and actually did submit to the legislative jurisdiction of the State of Washington.

TERMS OF APPELLANTS' CONTRACT REQUIRE SUBMISSION TO THE JURISDICTION OF THE STATE OF WASHINGTON

Inasmuch as appellants are engaged in the construction of the base of a huge dam to be used ultimately for power and irrigation projects which are essentially state projects, the contract quite naturally required appellants to submit to the jurisdiction of the State of Washington. Article 21 of the contract required the contractor to comply with the workmen's compensation laws of the State of Washington. This was done, and the contractors themselves have voluntarily complied with and are now

enjoying the benefits of the Industrial Insurance Act of the State of Washington.

Specification No. 35 which is a part of the contract specifically requires the contractor to comply with all laws and regulations of the State of Washington or any agency or subdivision thereof which affect the building, maintenance or operation of the contractors' camp required by the same specification to be erected on land acquired by the Federal government for that purpose.

Specification No. 38 requires the contractor to dispose of garbage and refuse as required by the contracting officer or by the proper state "* * * or local regulatory authority * * *." It provides that the discharge of sewage shall conform to the laws and regulations of the Department of Health for the State of Washington.

Specification No. 42 requires that the contractor should make all necessary arrangements with the proper state and county authorities for school facilities and instruction for families of the contractors, employees and other residents in the camp site. There are two school districts regularly established by the state on the area used for the project. (R. 106.)

Specification No. 43 provides for the cooperation of the Washington State Patrol with the government in furnishing police protection.

In brief, the state and county governments exercise every function normally exercised in other parts of the State of Washington, and appellants in conducting their various businesses have voluntarily submitted to and enforced state laws, including the collection of state taxes.

ARGUMENT

THE TAX INVOLVED IS VALIDLY IMPOSED ON A LOCAL BUSINESS, AND IS NOT A FORBIDDEN BURDEN ON THE UNITED STATES GOVERNMENT OR ITS INSTRUMENTALITIES

Inasmuch as appellants have attempted to construe the occupation tax involved in this case as a tax either directly upon the contract executed by the government, or upon sales to the government, an understanding of the state's plan of taxation which was in effect at the time appellants bid on the contract is important.

Prior to the legislative session of 1933, the government of the State of Washington was supported almost entirely by the taxation of property, real and personal. However, by initiative measure passed by the people at a general election on November 8, 1932, the amount of taxes which might be levied upon real and personal property for state, county, school district and city or town purposes was limited in any one year to forty mills on the dollar of assessed valuation, the assessed valuation being 50% of the true and fair value of such property. (Chapter 4, Laws of Washington for 1933.)

In order to raise additional taxes to take the place of the consequent decrease in taxes on property, the legislature of the State of Washington at its 1933 session enacted an income tax and an occupational tax, the latter, chapter 191, Laws of 1933,

as amended by chapter 57, Laws of 1933, Ex. Sess., p. 157, being the tax involved in the case at bar.

This occupational tax has been repeatedly sustained by the supreme court of the State of Washington as an excise tax levied solely for revenue purposes upon local businesses. Specifically it has been sustained as imposed upon municipal corporations operating utilities and conducting businesses in the nature of private enterprises (similar to the power project involved in the case at bar).

Tacoma v. State Tax Commission, 177 Wash. 604.

The same act was involved in *Rainier National Park Co. v. Henneford*, 182 Wash. 159, 45 Pac. (2d) 617, in which case the court pointed out that the tax was not imposed as a prerequisite to entering into or for the regulation of business, but was solely for revenue purposes. The tax was there sustained as imposed upon the business conducted by the Rainier National Park Co. under a contract with the Federal government. Certiorari was denied by the supreme court of the United States, 56 S. Ct. 307.

The tax is essentially the same as the tax involved in *Pacific Telephone & Telegraph Co. v. Seattle*, 172 Wash. 649, where the supreme court of the state held that the state had the same right to impose a tax upon a local business or the right to do a local business as it had to tax the real and

personal property of a company doing business under a franchise from the Federal government.

In *Pacific Tel. & Tel. Co. v. Tax Commission of the State of Washington*, 56 S. Ct. 522, the supreme court of the United States said with reference to the effect of the same tax on interstate commerce that it did not differ from an *ad valorem* tax upon tangible property used in interstate commerce.

The court also pointed out in this case that where the collection of the tax was being made by an action at law, the tax was not open to objection that some portion of the act might contain penal provisions and provide for extraordinary civil remedies which might be held invalid if sought to be invoked.

Western Union Telegraph Co. v. Massachusetts, 125 U. S. 554;

Nickell v. Dept. of Labor & Industries, 164 Wash. 589.

No contention is made that the state is about to embarrass the performance of a Federal contract. A demand was made for the payment of the tax at the express request of counsel for appellants in order that this suit might be started. But appellants are actually present in the State of Washington and are transacting business in the State of Washington, and are subject to the jurisdiction of the courts of the State of Washington, and the ordinary remedy by suit at law is available to the state, if that should become necessary.

APPELLANTS ARE ENGAGED IN PRIVATE BUSINESS FOR PROFIT, AND ARE THEREFORE NOT ENTITLED TO THE FEDERAL GOVERNMENT'S IMMUNITY FROM STATE TAXATION

Counsel for appellants argue that the tax involved is levied solely on the privilege of building the foundation of the dam for the completed power project for the United States, and that the tax is in effect levied directly on a purchase by the United States.

The supreme court of the State of Washington held otherwise and held that the tax was imposed upon the business conducted by appellants in the same manner as was imposed upon business conducted by other contractors doing work for private parties, the state, or subdivisions thereof. (R. 65.)

In making this contention, counsel ignore the admitted fact that appellants are independent contractors engaged in business for gain, and all of the cases which hold that independent contractors with the government for gain can not claim immunity from taxation by reason of furnishing material or labor to the United States.

The same appellants sought to obtain immunity from the Washington State Compensating Tax in *Silas Mason Co. v. Henneford*, 15 F. Supp. 958, on the ground that in the prosecution of the work they were agencies or instrumentalities of the United

States. The statutory three-judge court in rejecting this contention said, at page 960:

"We think that under the record before us this contention is not well founded, when we are confronted with the facts that the plaintiffs are nothing more than independent contractors performing work and furnishing materials for a definite price which the government has agreed to pay and they have agreed to accept under the contract obtained by competitive bids. *Their relations to the government are contractual; they do not exercise governmental functions, as they only undertook to construct the dam according to plans and specifications, adopted by the government, for a profit to be made in so complying. In no way is the government affected by the fact that they pay or do not pay taxes or that they are a governmental instrumentality.* The cases relied upon by plaintiffs are not applicable to the facts here for we find that most of them are based upon facts where the parties claiming exemption were either agents of the government or engaged as employees or officers of the government in the exercise of governmental functions. The authorities seem to agree that independent contractors with the government for gain cannot claim immunity from taxation by reason of furnishing material or labor to the United States." (Citing cases.) (Italics ours.)

The tax involved in this case (a tax on the privilege of using chattels purchased outside of the state) was sustained as imposed on these same appellants by the supreme court of the United States in *Henneford v. Silas Mason Co., Inc.*, No. 418, October Term, 1936, in an opinion handed down on March 29, 1934.

The argument sought to be made by counsel for

appellants in this case was made with much greater force in the case of *Rainier National Park Co. v. Henneford*, 182 Wash. 159, where an independent contractor was doing business under a contract with the Federal government in the operation of a park permanently owned and maintained by the Federal government, for in the case at bar, the project is presumably a self-liquidating project which may be operated by the state or by a public utility under a franchise from the state and the Federal government. Nevertheless certiorari was denied, 296 U. S. 647.

The supreme court of the state of Oregon has uniformly rejected the contention that independent contractors engaged in the performance of contracts with the Federal government for private gain are in any manner exempt from taxation by virtue of the fact that the contract is with the Federal government.

General Construction Co. v. Fisher, 149 Or. 84, 39 Pac. (2d) 358;

Winston Bros. v. State Tax Commission, 65 Pac. (2d) 7;

Atkinson v. State Tax Commission, 24 Oregon Advance Sheets at page 536.

In *General Construction Co. v. Fisher*, 149 Or. 84, the supreme court of the state of Oregon quoted from *Gromer v. Standard Dredging Co.*, 224 U. S. 362, which it carefully analyzed as sustaining a tax on property owned and operated by a contractor in

improving the harbor of the city of Porto Rico, and pointed out that the principles applied by the supreme court of the United States in the *Gromer* case applied with greater force in the case of a contractor constructing a dam in connection with an irrigation project, inasmuch "* * * the work being done by the federal government, although a governmental function was in the nature of a private enterprise carried on for the benefit of those who would eventually be called upon to pay for it—the settlers on the land embraced within the irrigation project."

The supreme court of Oregon made no distinction between the power of a state to tax the property of an independent contractor and the business of an independent contractor, saying that if the property was taxable, the privilege of using it in performance of the contract would also be taxable.

Six Companies v. De Vinney, 2 Fd. Supp. 693, is one of the earliest cases involving the state taxation of an independent contractor engaged in the performance of a contract with the Federal government for the construction of a dam and power plant. In rejecting the claim of immunity from such taxation, the court said:

"This case and the cases therein cited deal with acts of officers or employees in the exercise of governmental functions, and the cases are unanimous in holding that in so acting they are not subject to the revenue or police laws of a state. *The case of a corporation contractor for the construction of*

public works is one in which, if it may be said to be an instrumentality of the government, its relations to the government are nevertheless purely contractual. It does not exercise governmental functions. It undertakes to construct according to plans and specifications adopted by officials of the government. It is organized for that and similar purposes and its primary object is to comply with the conditions of the contract for the profit to be made in so complying. In the case of *Clallam County v. United States*, 263 U. S. 341, 44 S. Ct. 121, 68 L. Ed. 328, the court held that 'the Spruce Production Corporation was organized by the United States as an instrumentality for carrying on the war,' and said: 'This is not like the case of a corporation having its own purposes as well as those of the United States and interested in profit on its own account'." (Italics ours.)

To the same effect is *Nevada-California Power Co. v. Ullom*, 3 F. Supp. 934, in which case the company claiming immunity from state taxation was supplying electrical energy needed in the construction of the Hoover Dam.

The court pointed out that the contract was entered into in pursuance of an advertisement for competitive bids for the supplying of the electricity, and that a contractor under such a contract is not such an instrumentality of the government as would relieve it from state and county taxes.

In *Meyer Construction Co. v. Corbett*, 7 F. Supp. 616, the court considered the application of a contractor engaged in the construction of buildings on Hamilton Field maintained by the Federal government as a bombing base. The contractor complained

that it was compelled to pay the sales tax on purchases made by it of materials going into buildings which were being constructed for the Federal government. The court in denying injunctive relief said:

"(1) May the plaintiffs raise the issue that the Retail Sales Tax Act affects the United States of America? *The fact that the plaintiffs have contracts with the United States of America for the construction of certain structures on a government reservation does not constitute the plaintiffs an agency or instrumentality of the United States of America. Therefore, the purchase by the plaintiffs of materials, as set forth, cannot be looked upon as a purchase by the United States of America.* The plaintiffs are not the proper parties to raise the issue that the United States of America will be hampered or impeded by the collection of a sales tax as here set forth. *Trinityfarm Construction Co. v. Alice Lee Grosjean*, 54 S. Ct. 469, 78 L. Ed. 918 (March 5, 1934), and the cases cited therein." (Italics ours.)

In the earlier case of *Thompson v. Pacific Railroad Co.*, 76 U. S. 579, the supreme court of the United States pointed out that the power to tax the property, *business* and persons is original in the states, and is not lost simply because business may be done with the Federal government, at least in the absence of an express prohibition by the Federal government. As authority for this proposition the court referred to *Lane County v. Oregon*, 7 Wall. 77, and *National Bank v. Commonwealth*, 76 U. S. 353.

In *Baltimore Shipbuilding and Drydock Co. v. Baltimore*, 195 U. S. 382, the supreme court in rejecting a claim for immunity from state taxation used the following language which has been repeatedly referred to by the courts with approval:

"* * * But, furthermore, it seems to us extravagant to say that an independent private corporation for gain, created by a state, is exempt from state taxation, either in its corporate person, or its property, because it is employed by the United States, even if the work for which it is employed is important and takes much of its time. * * *"

In *Ohio River Contract Co. v. Gordon*, 244 U. S. at page 71, the supreme court of the United States said:

"We at once put out of view the contention that the trial court was without jurisdiction because the parties at the time of the accident were engaged in work under a contract with the United States Government since the want of merit in the proposition has been previously established. *Gromer v. Standard Dredging Co.*, 224 U. S. 362, 371."

These cases from the supreme court of the United States are frequently cited as the leading authorities for the proposition that an independent contractor for gain with the Federal government is not an instrumentality of the Federal government and is not exempt from valid state taxation for any reason on account of the exemption of the Federal government. The principles underlying these cases have never been departed from.

While these cases do not involve excise or privilege taxes imposed in respect to business, courts of

other states have applied these principles in cases where exemption is attempted to be claimed from excise or privilege taxes, and the supreme court in each instance has refused to take jurisdiction for want of a substantial Federal question.

The identical tax was sustained as against an independent contractor performing work under a contract with the Federal government in *Rainier National Park Co. v. Henneford*, 182 Wash. 159, and certiorari was refused by this court. 56 S. Ct. 307.

In *General Construction Co. v. Fisher*, 39 Pac. (2d) 358, an excise tax of the state of Oregon on the privilege of doing business was sustained as imposed upon an independent contractor performing work under a similar contract with the Federal government.

An apppeal from this decision was dismissed for want of a substantial Federal question. (295 U. S. 715.)

In the case of *Ralph Sollitt & Sons Constructing Co. v. Virginia*, 172 S. E. 290, the supreme court of appeals of Virginia observed in passing upon a claim of exclusive jurisdiction in the Federal government that a contractor similar to appellants was "* * * in no sense an instrumentality of the government." An appeal from this case was dismissed for want of a substantial Federal question. (292 U. S. 599.)

It goes without saying if in any of these cases the impeding of a Federal function or the embarrassment of the Federal government in any way were involved in connection with the imposition of an excise tax on an independent contractor in the performance of a contract with the Federal government, that the supreme court of the United States would have taken jurisdiction.

It is submitted, however, that the question has been definitely decided by the supreme court of the United States in *Trinity farm Co. v. Grosjean*, 291 U. S. 466, repeatedly cited in dismissing such appeals.

In dismissing the appeal in the *General Construction Co.* case (79 L. Ed. 1671) the supreme court cited, in addition to the *Grosjean* case, *Metcalf v. Mitchell*, 269 U. S. 514; *Alward v. Johnson*, 282 U. S. 509; *Lucas v. Howard*, 280 U. S. 526, and *Lucas v. Reed*, 281 U. S. 699. Each of these cases turned upon the question of whether or not the person claiming immunity from taxation was an independent contractor or an agency of the state or Federal government, standing for, and, in fact, representing the government. If an independent contractor, there is no immunity from taxation otherwise valid.

In the case of *Trinityfarm Co. v. Grosjean*, 291 U. S. 466, so often relied upon in sustaining valid state taxes as imposed upon independent contrac-

tors doing business with the Federal government, this court held that a state excise tax on gasoline used by an independent contractor in constructing levees in aid of navigation of the Mississippi river under contract with the Federal government was not invalid as a tax on the means or instrumentality of the Federal government.

There, as here, learned counsel relied upon *Gillespie v. Oklahoma*, 257 U. S. 501, and kindred cases (291 U. S. at page 466), and that line of cases headed by *McCulloch v. Maryland*, 4 Wheat. 316 (291 U. S. at page 469). There, as here, it was urged that the contracts are governmental means or instrumentalities.

The supreme court of the United States definitely distinguished these cases and held that such authorities did not apply where, as in the case at bar, an independent contractor for gain attempted to claim the Federal government's immunity from state taxation. The supreme court simply said: "Appellant is an independent contractor. *Casement v. Brown*, 148 U. S. 615, 622. It is not a government instrumentality. *Cf. Metcalf & Eddy v. Mitchell*, 269 U. S. 514. *Group No. 1 Oil Corp. v. Bass*, 283 U. S. 279."

An application for rehearing was denied (54 Sup. Ct. 712). The tax on gasoline involved in the *Grosjean* case would have been void if the sale had been made to the government for governmental use. This was decided in *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218, which decision was followed by

the supreme court of the United States on May 18, 1936, in deciding the case of *Graves v. Texas Co.*, involving an excise tax based upon the withdrawal from storage for sale rather than on the sale.

In the *Grosjean* case and in *Meyer Construction Co. v. Corbett*, 7 Fed. Supp. 616, the tax was applied to an independent contractor and not to the government. That is the distinction. The decision did not rest, as counsel for appellants argue, upon the nature of the tax, but was grounded squarely upon the fact that a tax on a contractor was not a tax on the government or on a governmental instrumentality.

The decision in the *Grosjean* case recognizes that all taxes paid by an independent contractor engaged in the performance of public works under a contract with the government may in some degree be said to affect the government and therefore the court emphasized the fact that if the Federal government was affected at all, the burden was "consequential and remote."

The supreme court of the State of Washington in the opinion appealed from correctly distinguished the cases relied upon by appellant by saying that in those cases "the tax was on the sale to the government and was direct and immediate. Here, the occupation tax is but one of numerous incidental expenses necessarily inhering in the qualification of the contractors to perform the work for the government." (R. 65.)

In deciding the *Grosjean* case (291 U. S. at p. 472) the supreme court said:

"If the payment of state taxes imposed on the property *and operations* of appellant affects the Federal government at all, it at most gives rise to a burden which is consequential and remote and not to one that is necessary, immediate or direct."

This language applies with peculiar force to appellants, inasmuch as the occupational tax which is a tax on a business or operations simply replaces revenues for the support of the state which were formerly obtained from taxes on property.

One of the many cases involving the converse of the principles laid down in the foregoing cases is *Kreipke v. Commissioner* (C. C. A. 8th Circuit, 1929), 32 Fed. (2d) 594. The case involved a claim for exemption from Federal taxation on the ground that a contractor engaged in the erection and repair of buildings owned by the state of Oklahoma was in some manner entitled to the exemption from Federal taxation enjoyed by the state.

The claimed exemption was denied and the distinction between cases relied upon by counsel for appellants in the case at bar was pointed out. The court observed (32 Fed. (2d)) at page 597:

"* * * It would be a far-fetched doctrine to hold that every person, partnership, or corporation entering into a contract with a state government to do repair work on state buildings or buildings of political subdivisions of the state becomes an instrumentality of the state government and entitled to claim immunity from all federal taxation.

"*Appellant and his partnership were independent contractors and in no way instrumentalities or agencies of the state.* The cases cited by appellant on this point are not applicable to the situation here presented." (Italics ours.)

There appears to be but one decision which would lend some support to the contention of appellants in the case at bar. In *Dravo Contracting Co. v. Fox*, 16 Fed. Supp. 527, which is now on appeal to this court, the court construed a two per cent state gross sales and income tax attempted to be levied by the state of West Virginia by distraint on the property of the contractor to be a tax directly upon the government. The court used the following language in so finding:

"Here we reach the conclusion that the tax is upon the contract, and therefore upon the United States, and not upon the contractor."

And again:

"We are of the opinion that the tax here sought to be collected from the plaintiff is a direct burden upon the United States in contracting with the plaintiff rather than a tax upon the income of the contractor."

In the case at bar there is no attempt to distrain the property of the contractor or to embarrass the Federal government, and the construction of the tax by the supreme court of the state which will be followed by this court is that the tax is upon the local business of the contractor and not upon the government or any of its agencies or upon a sale to the government.

The trial court in the *Dravo Contracting Co.* case reported in 16 F. Supp. 527, appears to have been influenced somewhat in its construction of the tax by the fact that the tax was levied upon gross sales and income rather than upon the net income. In making this distinction the court failed to give due weight to the decision of the supreme court of the United States in *Trinityfarm Co. v. Grosjean*, 291 U. S. 466, where it was pointed out that the immunity of the United States was not affected by questions of degree. The decision is also out of harmony with all other Federal and state decisions.

It is submitted that the supreme court of the State of Washington correctly construed the occupational tax in the case at bar as one upon the contractor and not upon the government or upon a sale to the government, and that, therefore, even under the implication of the *Dravo Contracting Co.* case, the tax is validly imposed upon appellants.

The Work Involved Is Essentially Private in Its Nature Whether Contracts Were Let by the State or Federal Governments

A private company erecting a dam in a navigable river for the purpose of producing and selling power under a license from the Federal government is not an agency or instrumentality of the Federal government so as to be immune from valid state taxation. *Susquehannah Power Co. v. State Tax Commission of Maryland*, 283 U. S. 291.

Nor could such a company claim exemption from a valid state tax on power produced and sold under a Federal license upon the ground that the tax interfered with a Federal function or burdened the Federal government. *Broad River Power Co. v. Query*, 288 U. S. 178.

It follows, therefore, that should the Federal government attempt to utilize the dam being built for power purposes through some agency or instrumentality, that agency or instrumentality would be subject to state taxation as neither the state nor the Federal government can invade the field of private business clothed with immunity from taxation.

Helvering v. Powers, 293 U. S. 214;
Flint v. Stone Tracy Co., 220 U. S. 107.

In *Twin Falls Canal Co. v. Foote*, 192 Fed. 583, the court considered the capacity in which the Federal government participates in these irrigation projects. To quote from page 594:

"(1) *In prosecuting such an enterprise, however, it is not primarily performing a governmental, or, strictly speaking, even a public function, but is promoting proprietary interests.* Such advantage as arises therefrom to the people at large is material and not governmental, and is only such as might indirectly accrue to the public from the reclamation of an equal amount of land through private enterprise. *Kansas v. Colorado*, 206 U. S. 46, 92, 27 Sup. Ct. 655, 51 L. Ed. 956; *United States v. Hanson*, 167 Fed. 881, 93 C. C. A. 371; *United States v. Burley* (C. C.), 172 Fed. 615, *Id.*, 179 Fed. 1, 102 C. C. A. 429."

There can be no question but what the state government has jurisdiction in all matters regarding the appropriation and beneficial use of the waters of the state in connection with the reclamation of arid lands even though the same may be owned by the Federal government.

Twin Falls-Salmon River Land Co. v. Caldwell, 272 Fed. 356. Affirmed 266 U. S. 85;

California-Oregon Power Co. v. Beaver-Portland Cement Co., 295 U. S. 142.

Appellants, of course, would be taxable if the contracts were let by the state government or by a public utility authorized by either the state or the Federal government.

A power project is, of course, strictly private in nature.

A discussion of the cases illustrating the necessity of either the state or Federal government being allowed to tax the other government when that other government enters the field of private business will be found in *People v. Graves*, 283 N. Y. S. 538. In that case the appellate division of the supreme court of New York found that a corporation owned by the government and engaged in the operation of railroads, and so forth, was not engaged in a necessary and essential governmental function so as to render the salary of its general counsel immune from a state income tax.

APPELLANTS ARE DOING BUSINESS IN THE STATE OF WASHINGTON AND SUBJECT TO ALL VALID TAXES LEVIED BY THE STATE OF WASHINGTON

Appellants necessarily use state lands in the performance of their contract.

In *Sollitt & Sons Construction Co. v. Commission of Virginia*, 172 S. E. 290, 91 A. L. R. 774, a foreign corporation entered into a contract with the United States to build a postoffice in Virginia. In performing this contract it was necessary for the contractor to make use of the adjoining streets.

The contention was made in that case, which is hinted at in the case at bar, that the performance of one such contract was not doing business in the state.

In disposing of this contention the Virginia supreme court of appeals said:

"The first contention of the company is that the tax statutes cannot be construed to impose a license tax against the company, for the reason that the company is not transacting the business of a contractor in Virginia. We are unable to concur in that contention. The proof shows conclusively that it is a physical impossibility for the company to execute its contract without that which, in effect, amounts to an appropriation of the state's property to the denial, as a matter of fact, of the right of citizens to its usual and proper use. If, then, the manual execution of the company's contract requires that it be executed in part within the state, in contradistinction to its execution wholly within the confines of government property, then it must follow that the license tax imposed is within the

purview of the statute requiring a license for the privilege of transacting business in this state."

Touching the merits of the claim of immunity, the same court said:

"It has been repeatedly held by the Supreme Court of the United States that the states, when they entered the Union, did not surrender their power to tax federal agencies doing business in the states for personal profit."

In *Nikis v. Commonwealth*, 131 S. E. 236, the same court referred to the state's right to tax the business as on the same plane with the right to tax the property of persons doing the business.

Ohio River Contract Company v. Gordon, 244 U. S. 68, is squarely in point. The company was engaged in performing a contract with the United States to construct a canal with locks and dams.

After disposing summarily of the claim that the state courts were without jurisdiction on the ground that the contract was with the United States, the court said:

"The remaining contentions are also we think without merit. Conceding for the sake of the argument only that the canal reservation was within the exclusive legislative jurisdiction of Congress, it is clear from the facts we have stated that the business carried on by the corporation was not confined to the land owned by the United States, since it is admitted that in order to dispose of the material excavated in the construction of the canal a line of railway was built which extended beyond the reservation and connected with the tracks of the Kentucky and Indiana Terminal Railway, upon whose

property all of the earth and rocks were dumped. This clearly constituted the doing of business within the State and subjected the corporation to the jurisdiction of the Kentucky courts."

In the case at bar the Federal government necessarily occupies a section of state land in connection with this enterprise and appellants actually use a portion of this land. Of course, for a considerable period of time appellants actually maintained their office in the city of Spokane, Washington, from which place their business was conducted.

But the main portion of the work is being done upon the bed of the Columbia river. Inasmuch as the river is navigable, the title to the bed is in the United States subject to a right in the Federal government to use the land for any proper purpose in aid of navigation.

While the Federal government has the right to use the beds of navigable streams, it does not desire to obtain exclusive jurisdiction. It has not attempted to acquire title to the bed of the Columbia river in connection with the Coulee Dam project.

Stockton v. Baltimore, 32 Fed. 9;
United States v. Utah, 283 U. S. 64;
Shively v. Bowlby, 152 U. S. 1;
United States v. Arizona, 295 U. S. 174.

Relying on these cases, the supreme court of the state of Oregon held that contractors building the Bonneville dam across the Columbia river within the state of Oregon were doing business in the

state of Oregon and were subject to an excise tax levied by the state of Oregon.

Atkinson v. State Tax Commission (Feb. 18, 1937, 24 Oregon Advance Sheets 535.

Although appellants in the case at bar have assigned as error the failure of the supreme court of the state to hold that the Federal government has exclusive jurisdiction over the land which it did acquire in connection with the Coulee Dam project, the argument is not developed in this case, but is presented in full in the case of *Ryan v. State Tax Commission*. It is sufficient, therefore, to point out here that no effort whatever was made by the Federal government to acquire title to the soil underneath the Columbia river below ordinary high water mark, and that such portions of land as were purchased by the Federal government are not actually being governed by any branch of the Federal government, nor does the Federal government in any way exercise or claim jurisdiction over the same, that claim being left to the contractors who seek to raise the same for the purpose of avoiding state taxation only.

THE IMPOSITION OF A PRIVILEGE TAX BY A STATE BASED UPON THE GROSS INCOME WITHIN THE STATE OF AN INDEPENDENT CONTRACTOR FOR GAIN WITH THE UNITED STATES DOES NOT CONSTITUTE A DIRECT BURDEN UPON THE OPERATIONS OF THE UNITED STATES

Counsel for appellants attempt to construe the occupational tax instead of being a tax upon the business of contracting conducted for private gain as administered by the state authorities and construed by the supreme court of the State of Washington as a tax on sales to the United States government, and as a direct burden upon that government, because it is based upon gross income rather than net income.

The cases heretofore cited all answer the argument that this tax is a tax upon sale to the United States government. It is what it purports to be and what the supreme court held it to be, a tax on an occupation conducted for private gain which forms but one of many incidental expenses necessary to enable appellants to carry on their contracting business in the State of Washington.

It was a tax which appellants knew they would have to bear in addition to other forms of taxation when appellants placed their bids with the Federal government.

Instead of being a tax on a sale to the government it is a tax which in no way affects the government, for the government has agreed to pay

fixed prices for materials furnished and labor performed under the contract, and will be compelled to pay these prices regardless of whether appellants are compelled to pay state taxes. If appellants are successful in this case in avoiding liability for the Washington business tax, their profits will be increased but the cost of the project to the government will not be lessened in any degree.

This was clearly pointed out by the supreme court of Oregon in *General Construction Co. v. Fisher*, 39 Pac. (2d) 358 (dismissed for want of a substantial Federal question, 295 U. S. 715).

Inasmuch as this tax is a tax to be paid by an independent contractor, it makes no difference to the Federal government whether the tax is measured by net income or gross income. This was clearly pointed out by the supreme court of the United States in *Trinityfarm Construction Co. v. Grosjean*, 291 U. S. 466, where it was contended that contracts similar to the contract in the case at bar were a Federal means or instrumentalities, and where it was argued that the excise tax involved in that case would constitute a burden thereon.

The supreme court of the United States held, however, that the tax was proper and not a burden on the Federal government, and pointed out that where the doctrine of immunity of the Federal government applied, immunity was absolute and was wholly unaffected by matters or distinctions of de-

gree, quoting from *Indian Motorcycle Co. v. United States*, 283 U. S. 570.

In *Commissioner v. Ten Eyck*, 78 Fed. (2d) 515, it was stated that where the immunity from taxation existed it rested upon the entire absence of power to tax.

The point is that the tax is not sought to be imposed on a contract but is on the occupation or business of contracting. It was not imposed upon appellants because they are under contract with the Federal government, but applies to all who engage in the contracting business in the State of Washington. The tax being upon the contractor, there is no room to argue that one form of tax would be a direct burden upon the United States and another form would not.

If in fact the United States was purchasing something, it could not be taxed in any way. There is, however, no room for arguing that the United States government is purchasing anything, inasmuch as it is contemplated that title to the power plant will not rest permanently in the Federal government.

The supreme court of the State of Washington correctly construed the occupational tax as imposed upon appellants as in no sense a tax on the contract or on the Federal government.

APPELLANTS ARE NOT IN A POSITION TO COMPLAIN OF THE TAX INVOLVED IN THIS CASE, THE FEDERAL GOVERNMENT NOT COMPLAINING NOR HAVING COMMISSIONED APPELLANTS TO DO SO

In the case of *State v. Wiles*, 116 Wash. 387, the supreme court of the State of Washington held that one who contracted with the Federal government to carry mail was subject to the motor vehicle license tax imposed by the State of Washington upon the motor vehicle used in the performance of the contract. The supreme court of the state in this case pointed out that there was nothing in the contract with the government which would indicate that the government intended to pass its immunity on to the independent contractor. This being so, the court said: "Under these circumstances it should be presumed that it was the intention that he should be subject to the general laws of the state."

In the case at bar it is not necessary to make this presumption, for the Federal government in every way material to the orderly performance of the contract has required appellants to submit to the jurisdiction of the state and county governments.

Both state and Federal courts in denying similar claims for exemption from state taxation have pointed out that where the Federal government is not complaining, a private party is in no position to do so for the purpose of avoiding taxation.

General Construction Co. v. Fisher, 39 Pac. (2d) 358;

Meyer Construction Co. v. Corbett, 7 F. Supp. 616;

Silas Mason Co. v. Henneford, 15 F. Supp. 958;

Trinityfarm Construction Co. v. Grosjean, 291 U. S. 466.

It must not be forgotten that the moneys allotted to the State of Washington for this project were relief moneys. Moneys, which if otherwise expended within the state for school buildings, etc., would have been constructed under contracts by the state itself. This court in the early case of *Thompson v. Pacific Railroad Co.*, 76 U. S. 579, at page 592 pointed out that such gratuities of the Federal government can not support a claim of immunity from state taxation.

Especially is this so where, as in the case at bar, a private business seeks immunity from state taxation while enjoying the protection of the state for whose very existence the tax is necessary.

CONCLUSION

In conclusion it is respectfully submitted that the Washington occupational tax to which appellants object is what it plainly purports to be, an excise tax imposed on all engaged in the contracting business, and is in no sense a tax on any specific contract nor a burden upon the Federal government or any agency or means thereof, and that the tax was correctly construed and sustained by the supreme court of the State of Washington, whose judgment should be affirmed.

Respectfully submitted,

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